

designation of Snell as a contact person did not compromise the Union Parish competitive bidding process.

The FCC's rules addressing E-rate competitive bidding practices have never, and do not today, address or define conflicts of interest in general, or how conflicts may arise by virtue of associations or affiliations between a service provider and a school or library. More specifically, no FCC rules address whether minority, non-controlling unitholder interests held by a school or library employee in a service provider under contract to the school or library might be considered a conflict of interest. The FCC's rules simply provide that applicants must seek competitive bids and comply with state and local procurement regulations. The FCC's rules state that its competitive bidding rules do not preempt state or local rules. To Union Parish's knowledge, the SLD did not have Support Mechanism rules posted on its website in 1999 that addressed conflicts of interest or prohibited associations. Today, the SLD's Support Mechanism rules briefly address conflicts of interest in the "Form 470 Reminders" section of its website.²⁹ The SLD's Support Mechanism rules apparently did not address "prohibited associations" or conflicts of interest that could compromise the competitive bidding process until September 2002 when it posted an announcement on its website with the holding of *MasterMind*.³⁰ The SLD also modified its Service Provider Manual in December 2002 to explain "inappropriate roles for service providers."³¹

²⁹ USAC, Form 470 Reminders, available at <http://www.sl.universalservice.org/whatsnew/reminders/f470.asp> (last modified April 29, 2003).

³⁰ USAC, September 2002 Announcements, available at <http://www.sl.universalservice.org/whatsnew/2002/092002.asp>.

³¹ USAC, Service Provider Manual, Chapter 5 - Service Provider Role in Assisting Customers, available at <http://www.sl.universalservice.org/vendor/manual/chapter5.asp> (last modified Dec. 11, 2002).

The state and local competitive bidding requirements for Louisiana, including Louisiana's conflict of interest rules, to which Union Parish was bound under both FCC regulation and state law, provide that a conflict of interest would be found if a public servant like Snell owned or controlled in excess of 25% of a company with whom the public servant's agency did business. The Louisiana Board of Ethics investigated the matter involving Snell and Send and found that Snell owned only 15% of Send and that he was not an employee of Send. The Ethics Board also found:

Snell did not participate in the initial contract between Send Technologies and the Union Parish School Board.... Based upon the information obtained, the Board concluded and instructed me to inform you that no violation of the Code of Governmental Ethics was presented by your ownership interest in Send Technologies.

Based upon the state of Louisiana finding that Snell committed no ethical violation, the absence of FCC rules addressing conflict of interest issues in these circumstances and the FCC's conclusion that its competitive bidding rules do not preempt state and local rules, the Commission must find that Snell did not have notice that his minority ownership interest in the school's service provider could raise a prohibited conflict of interest.

Moreover, Union Parish undertook a full and fair competitive bidding process, in good faith, and there is no evidence that the bidding process was affected in any way by Snell's minor holdings in the eventual winning service provider for two services. Although Snell was found by a state agency not to have violated any ethics rules, he nonetheless was insulated from the competitive bidding process in order to alleviate any concerns over perceived conflicts of interest. Accordingly, Union Parish complied with all federal, state and local competitive bidding rules that were in effect for the years in question.

B. Beyond Complying With the Competitive Bidding Rules, Did Union Parish Comply With the Underlying Intent of the Competitive Bidding Process?

1. Union Parish's Competitive Bidding Process Fulfilled the Underlying Intent of the Competitive Bidding Process.

The requirement for an E-rate Program competitive bidding process derives from Section 254(h)(1)(B) of the Communications Act, as amended,³² which provides that discounts under the schools and libraries universal service support mechanism must be given only for services provided in response to bona fide requests for services. Bona fide requests require fiscal responsibility by the applying schools and libraries and contracts with such applicants must be formed through a competitive bidding process. The competitive bidding process ensures that a school or library seeking support will obtain the most cost-effective services available, thereby lessening the applicant's demand on universal service funds and increasing funds available to other applicants.³³

The intent of the E-rate Program competitive bidding process, to ensure that Union Parish would obtain the most cost-effective services available, was not violated simply because Snell was listed as the contact person for Union Parish. The bright line analysis applied by the Administrator ignores the facts of this particular case. What is germane is that Union Parish undertook, in good faith, a full and fair competitive bidding process and received Internet services at less than half the cost of services offered by Send's competitors. Union Parish also received internal connections at rates that were a fraction of the costs offered by other

³² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 et seq; see 47 U.S.C. § 254(h)(1)(B).

³³ See *Universal Service Order*, 12 FCC at 9028-29.

competitors. (See discussion supra pp. 5-10). By obtaining services at the lowest costs possible, Union Parish lessened its own demands on universal service funds and increased funds available to other applicants. Thus, the process Union Parish went through to choose Send explicitly met the public policy objectives that underlay the competitive bidding rules.

2. Telcomm Services and Internal Connections Services Were Identical Whether Or Not Send Was A Service Provider.

It is the public policy to receive competitive bids, where applicable, in order to protect the taxpaying citizen against contracts of public officials entered into because of favoritism or those involving exorbitant or extortionate prices. None of those factors are present here.

Moreover, the local Telcomm Services provided for all the above FRNs were provided by BellSouth Telecommunications, Inc. or CenturyTel of Central Louisiana, Inc. They are the local service providers in Union Parish. CenturyTel provides local telephone service for the schools located in Marion, Louisiana; Linville, Louisiana and Rocky Branch, Louisiana. BellSouth provides local service for all other schools and the central office and other administrative facilities of Union Parish. The funds paid to BellSouth and CenturyTel for the local service had to be paid regardless of which entity was a successful bidder as internet service provider. Whether Send was the service provider or whether any other person or entity was the service provider, the identical funds would have been expended for these local Telcomm Services. The same is true for the Telcomm Services provided by AT&T Corp. It has been for years and currently remains the Union Parish long distance service provider. There was no change at the time of the award to Send and all charges that were paid to AT&T Corp. would have been paid to it regardless of the internet service provider. Smaller payments for Telcomm Services were made to Metrocall, Inc.

for pager services and to CenturyTel Wireless, Inc. for cellular. Those services would have been identical whether or not Send was a provider, for the same reasons.

The service provider for application number 121741 for internal connections was Global Data Systems, Inc. for the most part. Application Number 163210, FRN: 45275 had a service provider for internal connections of Dell Marketing, L.P. and FRN: 405449 had as the service provider for internal connections Anixter, Inc. Anixter, Dell and Global all provided internal connection services at or below market price. There is no allegation that the funds paid to or for internal connections were excessive. They were not. Those internal connection charges would have been incurred at the same level at the same sites and schools and for the same price whether Send was the internet service provider or not. All of the services have been in the past and continue to be performed. There is no question as to what issue. There is no question as to the reasonableness of the price for the local Telcomm Services; furthermore there is no choice as to service provider. All service providers were experienced, performed well and at a market or below price. The process utilized to choose those providers is not questioned nor is the providers' service or cost. Accordingly, the public interest served by the Commission's bidding rules were not violated nor was harm caused to any party.

3. Later-Adopted Commission Precedent Regarding Competitive Bidding is Inapplicable to the Union Parish Case.

The SLD's *post hoc* objection to Union Parish's Form 470 was based upon its conclusion in 2003 that Union Parish's Form 470 applications filed in 1999 contained "service provider contact information" which, according to the SID, constitutes a per se violation of the intent of the competitive bidding process. In its Appeal, Union Parish demonstrated that its applications

did not, in fact, contain service provider contact information.³⁴ Rather, the applications listed an employee of the school system as its contact person. In denying the Appeal, the Administrator characterized its objection to Union Parish's applications somewhat differently from the SLD, stating that the authorized contact person on a Form 470 cannot be "associated" in any way with a service provider as this violates the intent of the bidding process.³⁵ The Administrator also states that "any service provider contact information" on an FCC Form 470 violates competitive bidding requirements.³⁶

The SLD's and the Administrator's conclusions both rely upon a line of Commission decisions beginning in May of 2000 with *MasterMind Internet Services, Inc. ("MasterMind")*.³⁷ The Administrator's denial of the Appeal in this matter is based more upon Commission precedent adopted in later cases beginning in March of 2001, well after the Union Parish applications were granted and funded.

As discussed *infra* pp. 20-30, the holdings of the *MasterMind* cases cannot be retroactively applied to Union Parish's applications, which were granted and funded in 1999, 2000 and 2001. Even assuming, *arguendo*, that the later-adopted Commission precedent could be validly applied to Union Parish, the facts in those cases can be easily distinguished from the Union Parish case.

³⁴ See Appeal.

³⁵ See Administrator's Decision on Appeal.

³⁶ *Id.*

³⁷ *Request for Review of Decisions of the Universal Service Administration by MasterMind Internet Services, Inc.*, 16 FCC Red 4028 (2000) ("*MasterMind*").

In *MasterMind*, the Commission addressed for the first time when the E-rate Program competitive bidding requirements and the intent of the competitive bidding process are violated. *MasterMind* and its progeny generally hold that where a Form 470 lists a contact person for the applicant who is an employee or representative of a service provider, the Form 470 is per se defective.³⁸ In the most recent *MasterMind*-type case, *Dickenson*, the Commission interpreted the *MasterMind* precedent as follows:

In Mastermind Internet Services, Inc., the Commission held that, where an FCC Form 470 lists a contact person who is an employee or representative of a service provider, the FCC Form 470 is defective. The Commission observed that the "contact person exerts great influence over an applicant's competitive bidding process by controlling the dissemination of information regarding the services requested." On this basis, the Commission found that "when an applicant delegates that power to an entity that also will participate in the bidding process as a prospective service provider, the applicant irreparably impairs its ability to hold a fair and open competitive bidding process." It concluded that "a violation of the Commission's competitive bidding requirements has occurred where a service provider that is listed as the contact person on the FCC Form 470 also participates in the competitive bidding process as a bidder."³⁹

The facts contained in the various *MasterMind* cases can be easily distinguished from the facts in the Union Parish case. In the original *MasterMind* case (released May 2000), an employee of the service provider (MasterMind) was listed as the contact person on the

³⁸ *Request for Review of Decisions of the Universal Service Administrator by Dickenson County Public Schools, Clintwood, Virginia*, 17 FCC Rcd 15747 (WCB 2002) ("*Dickenson*"); *Request for Review of Decisions of the Universal Service Administrator by Consorcio de Escuelas y Bibliotecas de Puerto Rico, San Juan, Puerto Rico*, 17 FCC Rcd 13624 (WCB 2002) ("*Consorcio*"); *Request for Review of Decisions of the Universal Service Administrator by College Prep School of America, Lombard, Illinois*, 17 FCC Rcd 1738 (CCB 2002) ("*College Prep*"); *Request for Review of Decisions of the Universal Service Administrator by A.R. Carethers SDA School, Houston, Texas.*, 16 FCC Rcd 6943 (CCB 2001) ("*Carethers*").

³⁹ *Dickerson*, 17 FCC Red at 15748 (quoting *MasterMind*, 16 FCC Red at 4032).

applicants' Form 470s and this person prepared and distributed the RFPs to potential bidders. "In so doing, the Applicants surrendered control of the bidding process to an employee of MasterMind, a service provider that not only participated in the bidding process, but also was awarded the service contracts." ⁴⁰ Similarly, in *Carethers* (released March 2001), the Commission concluded that the person listed as the contact for a number of applicant schools in various states, Charles Scorpio, was an employee of, or associated with, the service provider. ⁴¹ The Commission further clarified its position regarding improper relationships between service providers and applicants in *College Prep*, *Dickenson* and *Consortio*. In these cases, the contact person listed on the Form 470s was an *employee* or *representative* of a service provider participating in the competitive bidding process. ⁴²

The SLD ignored critical factual differences in the Union Parish case from the *MasterMind* line of cases. First, in *MasterMind* and its progeny, the Commission denied the applicants' requests for funding because in each case an *employee of the service provider* was listed as the contact for the applicant. In this case, however, Snell was an employee of Union Parish, the applicant. Snell was not a representative, agent or employee of Send or any other

⁴⁰ *Mastermind*, 16 FCC Red at 4033.

⁴¹ *Carethers*, 16 FCC Rcd at 6948-49. The Commission based its conclusion on the fact that Scorpio had an email address through the service provider, had the same address as the service provider, and the contact person listed for the service provider in the SLD's database had the same last name as Scorpio. The Commission concluded that Scorpio could not be an employee of the schools because the schools were spread over a number of states. It also was never disputed that Scorpio was an employee of the service provider.

⁴² *College Prep*, 17 FCC Rcd at 1745; *Dickenson*, 17 FCC Rcd at 15748; *Consortio*, 17 FCC Red at 13626-27. In *College Prep*, the contact person was an officer of a service provider and negotiated the contracts with service providers on behalf of the applicant. In *Dickenson* and *Consortio*, the contact people listed on the applicants' Form 470s were employees of a service provider.

service provider. A service provider was not listed as a contact on Union Parish's Form 470s. Rather, Snell in his capacity as Technology Systems Administrator for the school system was the most appropriate person to be listed as the contact person on the Form 470s. Thus, the Administrator erred in finding that Union Parish's Form 470s contained service provider contact information.

Furthermore, unlike *MasterMind* and its progeny, Union Parish did not delegate the task of disseminating information regarding the services requested to Send. Union Parish undertook its own competitive bidding process in good faith, complied with all federal, state and local rules, considered all factors set forth under those rules, and obtained a ruling from the State Ethics Board confirming that Snell had no conflict of interest that would violate the local competitive bidding laws. Snell was walled off from the solicitation and evaluation of bids for any services in which Send was involved as a competing bidder. To further protect the integrity of the process, Snell did not participate in the initial or subsequent contracts between Send and Union Parish. Accordingly, Union Parish conducted a fair and open competitive bidding process and, as a result, entered into the most cost-effective contract for services. Unlike the applicants in the *MasterMind* line of cases, Union Parish's process was wholly consistent with the public interest requirements underlying the competitive bidding process.

Moreover, unlike the *MasterMind* line of cases, in which the applicants knew in advance when they prepared their Form 470s that the listed contact person was an employee of a service provider, Union Parish could not have known at the time it filed its Form 470 that listing Snell as its contact person, would, in retrospect, pose a theoretical threat to the competitive bidding process simply because Send would later submit a bid to provide services.

In each of the *MasterMind* cases the SLD and the Commission ruled on pending applications and funding requests and denied such applications prospectively. In this case, however, the SLD seeks to undo previously granted applications and rescind funding for services already rendered based upon later-adopted Commission precedent.

Importantly, the SLD and the Administrator have not asserted that the competitive bidding process undertaken by Union Parish did not comply with the Commission's rules and state and local competitive bidding requirements. The Administrator's sole focus was on the name of the authorized contact person listed on the Form 470. The conclusion is that because Snell was listed on the Form 470, Union Parish could not have undertaken a competitive bidding process. The facts in this case do not support such a conclusion. The Administrator values form over substance when it suggests that Union Parish's competitive bidding process would have been valid if only it had listed someone else as the contact person. Even if another person had been listed on Union Parish's application, it would not have impacted what was already a full and fair competitive bidding process undertaken by Union Parish in good faith.

Moreover, in the *MasterMind* line of cases, the conflict of interest presented is obvious because in each case the schools delegated their responsibility to undertake competitive bidding to service providers. That was never done in the case of Union Parish.

The holdings in the various *MasterMind* cases cannot be used as a blunt instrument, or a bright line test, without regard to the individual facts of a case - especially a case like Union Parish's. To do so misses the essential point - the spirit and letter of the competitive bidding rules was observed and the public interest was served by the bidding process undertaken by Union Parish.

C. Did the Administrator Exceed Its Authority When it Interpreted Current FCC Precedent Regarding Competitive Bidding and Then Retroactively Applied Such Interpretations to Union Parish's Granted Applications?

The FCC appointed USAC to administer the schools and libraries universal service support mechanism in 1998. USAC's authority over the E-Rate Program is limited to implementing and applying the FCC's Part 54 rules, and the FCC's interpretations of those rules as found in agency adjudications.⁴³ USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission⁴⁴ or to create the equivalent of new guidelines.⁴⁵ The Administrator exceeded its authority in Union Parish's case by imposing its own expanded interpretation of FCC precedent on Union Parish.

1. The Administrator Exceeded its Authority in Interpreting Commission Precedent.

The only FCC rules or precedents regarding competitive bidding that applied to Union Parish in 1999 when it filed its applications required that applicants "shall seek competitive bids" and observe local and state competitive bidding and procurement requirements. Union Parish complied with these requirements and its applications were granted.

The facts contained in the first *MasterMind* case are wholly inapplicable to Union Parish's case. It was not until March 2001, in *Carethers*, that the Commission first began considering that an "association" with a service provider could run afoul of the competitive

⁴³ 47 C.F.R. § 54.702(c).

⁴⁴ *Id.*

⁴⁵ *Changes to the Board of Directors of the Nat'l Exchange Carrier Ass'n, Inc.*, Third Report and Order, 13 FCC Rcd 25058.25066-67 (1998) ("NECA Third Report and Order").

bidding requirements.⁴⁶ The Commission also later discussed "associations" with service providers in *College Prep*, *Consortio*, and *Dickenson*.⁴⁷ It is important to note, however, that in all of these cases, beginning with *Carethers* and continuing through *Dickenson*, the contact person listed on the Form 470 was not an employee of the school or library but was, rather, "associated with" and employed by the service provider in some capacity. Thus the prohibited "association" the FCC has sanctioned to date is an exclusive association with a service provider, not a situation in which an employee of an applicant might have a minority unitholder interest in a service provider.

Even if the precedent established in *College Prep*, *Consortio*, and *Dickenson* was available to Union Parish in 1999, it is questionable whether Union Parish could have understood that listing its own employee as a contact person on its Form 470 could violate the competitive bidding rules, especially when there were no FCC or SLD rules or guidelines regarding conflicts of interest, Snell's passive ownership interest in Send was ruled not to be a conflict of interest under Louisiana law, and Snell was insulated from the competitive bidding process. The Administrator's interpretation of the FCC's precedent, that an applicant's contact person cannot be associated with a service provider (even when the contact person is an

⁴⁶ *Carethers*, 16 FCC Rcd at 6947-48. The Commission found that contact person on the Form 470 was likely a representative or employee of the service provider, and was married to another employee of the service provider.

⁴⁷ *College Prep*, 17 FCC Rcd at 1741 (stating that the core issue in the case "is whether the individual listed as the contact person on the applicant's FCC Form 470 was in fact associated with the service provider with whom the applicants contracted for service"); *Consortio*, 17 FCC Rcd at 13628 ("The presence of a representative or employee of a Service Provider as the contact on the Form 470, or any contract information associated with a service provider on the Form 470, renders that Form 470 invalid.") *Dickerson*, 17 FCC Rcd at 15749.

employee of the school or library), goes beyond the FCC's interpretation and seems specifically tailored to cast doubt on the Union Parish applications.

2. The Administrator Exceeded its Authority in Retroactively Applying Later-Adopted Commission Precedent to Union Parish's Granted Applications.

Even assuming, *arguendo*, that the Administrator interpreted FCC precedent correctly, the Administrator exceeded its authority by retroactively applying such precedent to Union Parish's case. It is a basic tenet of American jurisprudence that if a court overturns its prior precedent in a line of cases, the new precedent is applied prospectively. The court does not re-open every prior case, retroactively apply the new precedent and overturn all prior concluded decisions.⁴⁸

In *RKO General v. FCC*,⁴⁹ the U.S. Court of Appeals for the D.C. Circuit addressed retroactive application of new Commission precedent very clearly:

Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed ... and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect.⁵⁰

⁴⁸ See generally 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review.")

⁴⁹ 49 *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

⁵⁰ Id. at 223-24, citing *Boston Edison Co. v. PFC*, 557 F.2d 845 (D.C. Cir. 1997) *cert. denied sub nom. Towns of Norwood, Concord and Wellesley, Mass. V. Boston Edison Co.*, 434 U.S. 956 (1988).

In addition, "an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy." ⁵¹

The FCC's standard regarding prohibited "associations" and competitive bidding was first announced in *Carethers* in March of 2001. The new standard was not posted to the SID's website as a Support Mechanism rule, providing applicants with notice of the changed standard, until September of 2002. Consistent with the finding in *RKO*, new or changed standards can be applied prospectively only to pending or future applications, not retroactively to granted applications.

In addition, Union Parish detrimentally relied on prior SLD action in this case. The SLD granted Union Parish's Form 470s and distributed monies based upon those approvals. Union Parish and its vendors/service providers had every reason to conclude that the school system's Form 470s were valid and did not violate the E-rate Program's competitive bidding rules. Union Parish and its vendors/service providers detrimentally relied on the first application granted by the SLD and continued filing applications in successive years, all of which were granted. During that period, all of Union Parish's service providers provided valuable, competitively priced Internet access services, internal connections, and telecom services to Union Parish, all in reliance on the SLD's actions.

There is an extensive body of judicial case law regarding impermissible retroactivity in which the courts discuss basic notions of equity and fairness and detrimental reliance by citizens

⁵¹ *New England Telephone and Telegraph Co. v. FCC*, 826 F. 2d 1101, 1110 (D.C. Cir. 1987) citing *RKO General*, 670 F.2d at 223.

on prior agency policies.⁵² There is no need to present a full discussion of such retroactivity here, as the FCC's own decisions in prior SLD matters reflect its own concern about the retroactive application of new precedent.

In a November 5, 1999 Commission decision involving the E-rate Program, the Commission considered a case in which the Prairie City School District ("Prairie City") sought review of an SLD denial of its application for universal service support.⁵³ Prairie City argued that the SLD's denial should be overturned because Prairie City filed its application in reliance on filing guidelines provided by the SLD on its website. The FCC agreed with Prairie City and directed the SLD to issue a new funding commitment decision letter. *Citing Williamsburg James City*, the Commission found that where an application was submitted before the establishment of

⁵² See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. at 194, 202-03 (1947). See also *Verizon Telephone Co. v. FCC*, 269 F.3d 1098 (2001) ("[T]he governing principle is that when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'"); *Id.* at 1109, citing *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). Moreover, retroactivity will be denied "when to apply the new rule to past conduct or to prior events would work a manifest injustice." *Id.* citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987). To determine whether a manifest injustice will result from the retroactive application of a statute, a court must balance the disappointment of private expectations caused by retroactive application against the public interest in enforcement of the statute. *Demars v. First Serv. Bank for Sav.*, 907 F. 2d 1237, 1240 (1st Cir. 1990) (citing *New England Power v. United States*, 693 F. 2d 239, 245 (1st Cir. 1982)). The D.C. Circuit Court notes that it has not been entirely consistent in enunciating standards to determine when to deny retroactive effect in cases involving "new application of existing law, clarifications and additions" resulting from adjudicatory actions. In *Cassell v. FCC*, the court acknowledges that it has used the five-factor test set forth in *Clark-Cowlitz* as the "framework for evaluating retroactive application of rules announced in agency adjudications." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) citing *Clark-Cowlitz*, 826 F.2d at 1081. In a subsequent case, the court substituted a similar three-factor test. See *Dist. Lodge 64 v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). Today, the court has moved from multi-pronged balancing tests for impermissible retroactivity in favor of applying basic notions of equity and fairness. See *Cassell*, 154 F.3d at 486 (declining to "plow laboriously" through the *Clark-Cowlitz* factors, which "boil down to a question of concerns grounded in notions of equity and fairness"); *PSCC v. FERC*, 91 F. 3d 1478, 1490 (concluding that "the apparent lack of detrimental reliance ... is the crucial point [supporting retroactivity]"). In *Chadmoore Communications, Inc. v. FCC*, the court stated that the test it commonly uses to determine whether a rule has retroactive effect is if "it does not impair [] rights a party possessed when it acted, increase [] a party's liability for past conduct, or impose [] new duties with respect to transactions already completed." *Chadmoore*, 113 F.2d 235, 240 (D.C. Cir. 1997), citing *DIRECTV, Inc. v. FCC*, 110 F. 3d 816, 825-26 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

⁵³ *Request for Review of the Decision of the Universal Service Administrator by Prairie City School District*, 15 FCC Rcd 21826 (CCB 1999).

a particular and applicable rule, the applicants could not have been aware of the application requirements.⁵⁴ Likewise the Commission, recently recognized that clarifications of its universal service policies are to be applied prospectively only by the SLD. In *Ysleta*⁵⁵ and *Winston-Salem*⁵⁶ the Commission clarified that a party submitting a bona fide service request under the E-rate Program must provide a Form 470 that lists the specific services for which the applicant anticipates seeking E-rate discounts. In both cases, the applicants had submitted a Form 470 that listed every service or product eligible for discounts, rather than only those services or products that were consistent with the applicants' technology plans. The Commission found that such comprehensive lists did not comport with the competitive bidding requirements under the E-rate Program.⁵⁷

The Commission, however, did not invalidate the applicants' form 470 applications based upon this error.⁵⁸ Instead, it acknowledged that the SLD had previously granted funding

⁵⁴ *Id.* at 21827, citing *Request for Review of the Decision of the Universal Service Administrator by Williamsburg-James City Public Schools*, 14 FCC Red 20152, 20154-55 (1999) ("Williamsburg could not have been aware of the rules of priority at the time it filed its application." Williamsburg's application was also remanded for reprocessing and issuance of a new funding commitment decision letter. The applicant submitted its application in April of 1998 and new rules were adopted by the Commission in June of 1998).

⁵⁵ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, CC Docket Nos. 96-45, 97-2 1, FCC No. 03-313 (Dec. 8, 2003) ("Ysleta"). In *Ysleta* the Commission addressed multiple requests to review the decisions of the SLD that were filed by E-rate applicants, but combined the requests as they had almost identical fact patterns.

⁵⁶ *Request for Review of the Decision of the Universal Service Administrator by Winston-Salem/Forsyth County School District, Winston-Salem, North Carolina*, CC Docket Nos. 96-45, 97-21, FCC No. 03-314 (Dec. 8, 2003) ("Winston-Salem").

⁵⁷ *Ysleta* ¶¶ 26-37; *Winston-Salem* ¶ 13.

⁵⁸ As discussed below, the Commission did conclude in *Ysleta* that the applicants violated the E-rate Program's rules, although not because of the broad list of services included in the applicants' Form 470s. *Yelsta* ¶

requests based upon Form 470s that listed most or all possible services or products eligible for discounts under the E-rate Program and that participants in the Program could have reasonably relied on those approvals.⁵⁹ The Commission determined that such all-inclusive Form 470s "should not be permitted on a going-forward basis."⁶⁰ The Commission therefore "clarif[ied] prospectively that requests for service on the FCC Form 470 that list all services eligible for funding under the E-rate Program do not comply with the statutory mandate."⁶¹ The Commission in *Ysleta* also provided additional guidance regarding other aspects of the E-rate Program rules "to provide greater clarity to those *applicants re-bidding services and future applicants*."⁶²

It is patently clear that the Commission intended for its precedent in *Ysleta* and *Winston-Salem* to apply to pending or future applications and not applications that have already been granted and funded. Similarly, the Commission should conclude that the SLD cannot retroactively apply the Administrator's current interpretations of prohibited associations to Union Parish's case, if any such interpretations can even be found to apply. As in *Ysleta and Winston Salem*, the Commission has never determined that such passive unitholder interest creates an improper association between an applicant and service provider. Furthermore, Union Parish's funding requests were approved and monies were allocated to vendors/service providers well before the Commission announced in *Carethers* that certain associations between applicants and

⁵⁹ *Yelsta* ¶ 35; see also *Winton-Salem* ¶ 13.

⁶⁰ *Yelsta* ¶ 35; see also *Winton-Salem* ¶ 13.

⁶¹ *Id.* ¶ 36 (citation omitted) see also *Winton-Salem* ¶ 13.

⁶² *Ysleta* ¶ 59 (emphasis added). The Commission also noted that the "SLD will carefully scrutinize *applications*" to ensure that they comply with the clarifications elucidated in this case. *Id.* ¶ 65 (emphasis added). If the Commission wanted the SLD to apply those clarifications retroactively to prior SLD decisions, it would have specifically directed the SLD to do so.

service providers could violate the E-rate Program's competitive bidding rules. Union Parish and its vendors/service providers (and possibly other E-rate participants) relied on the competitive bidding rules, and interpretations thereof, that were current in 1999 and reasonably interpreted them to support the conclusion that the type of association presented in Union Parish and Send was permissible - especially since state and local procurement guidelines also were observed and no conflict of interest was found to exist by the Board of Ethics of Louisiana.

The Commission in *Ysleta* also concluded that the applicants' use of a particular bidding process (called a two-step Systems Integration process) did not satisfy the Commission's and the SLD's competitive bidding rules because the applicants could not in fact seek competitive bids under that process.⁶³ The Commission held that because the applicants had violated the competitive bidding rules, their funding requests must be denied. It rejected the argument that it could not apply the E-rate Program rules to the applicants' pending funding requests in an adjudicatory context. According to the Commission, "[t]he fact that in prior years, [the SLD] did not disapprove applications that utilized the procurement processes at issue in no way limits our discretion to apply our *existing rules*."⁶⁴ Because the SLD, however, did previously approve funding requests that utilized a Systems Integration process, the Commission granted the applicants' a waiver of the filing window, allowing the applicants to re-file for E-rate support.⁶⁵

⁶³ The Commission found that the applicant was seeking only bids for a vendor to serve as its System Integrator and not bids for all services listed on its Formo 470. *Ysleta* ¶ 25.

⁶⁴ *Id.* ¶ 58 (emphasis added).

⁶⁵ *Id.* ¶¶ 66-74. See part IV.E. below for further discussion on the Commission's grant of a waiver in *Ysleta*.

The Commission's precedent in these cases demonstrates that it intends for current E-rate Program rules to be applied to pending and future applications. Union Parish does not dispute that the Commission can apply its existing rules and precedent in an adjudicatory proceeding concerning pending applications. In this case, however, Union Parish's funding requests were approved long before the current precedent on associations between applicants and service providers was developed and the funding requests are no longer pending applications. In no part of *Ysleta* did the Commission direct the SLD to apply its current holding to applications that had already been granted and funded. Although the Commission specifically noted that other parties had previously used this System Integration process and had their funding requests approved, there is no indication that the Commission ever considered revisiting those decisions. Accordingly, the Administrator's attempt to apply current rules to re-open and invalidate Union Parish's applications which were granted and funded years ago should be prohibited.

The Commission also must consider the long term impact on the E-Rate Program if it does not reverse the Administrator's decision in the Union Parish case. Specifically, it will raise serious questions for other participants in the E-rate Program about whether they can ever rely upon actions taken by the SLD. Allowing the Administrator's decision to stand would mean that the SLD and the Administrator can retroactively deny previously granted applications based upon rules and precedent adopted after the applications are approved. In the face of such regulatory uncertainty, service providers could certainly conclude that the risk of devoting resources to provide E-rate services is too great. Schools, libraries, students and faculty would be those that ultimately suffer.

3. The Administrator has Advocated Applying Only Program Rules Relevant to a Particular Funding Year to Its Own Audits.

The concept of the SLD applying E-rate Program rules that were in effect only for a particular funding year to judge compliance with its program is something USAC, itself, has advocated for its own audits of E-rate Program compliance. In USAC's November 26, 2003 report to the Commission entitled "*Task Force on the Prevention of Waste, Fraud and Abuse*," the Task Force recommends that it develop audit policies that:

reflect compliance with the rules that existed during the funding year to which the funding was associated and to better communicate the degree of program compliance ... The Task Force believes that program audits, which are a necessary part of waste, fraud and abuse prevention, need to focus on the policies, procedures, eligible services, etc., that existed during the funding year that is being audited. Measuring program compliance against policies, procedures, eligible services, etc. which were not in place during a particular funding year is inherently unfair and invalid.⁶⁶

This approach should apply equally to participants in the E-rate Program like Union Parish.

D. Did the Administrator Exceed its Authority by Interpreting the FCC's Competitive Bidding Rules as Including Part 48 Federal Acquisition Planning Rules?

⁶⁶ *Recommendations of the Task Force on the Prevention of Waste, Fraud and Abuse*, CC Docket No. 02-6 at 10 (Nov. 26, 2003). The Task Force also makes a number of other recommendations to improve the schools and libraries program, concluding that "the program's competitive bidding process is not working as effectively as policy makers had intended." *Id.* at 5. "The Task Force believes there needs to be greater clarification of program rules, along with increased strong program support staff and educational outreach to further ensure optimal usage of program resources." *Id.* "Prior to the start of the annual training cycle, the SLD needs to provide clear policy, procedures, eligible services list, etc. for the upcoming program year and work to minimize the need for clarifications of the rules during the Program Integrity Assurance review process." *Id.* at 6. "The Task Force believes that if applicants have a better understanding of the rules and standards that will be applied, they will be better equipped to obey them. Providing clarity at the beginning of the cycle will also help avoid the waste associated with pursuing appeals that result from a misunderstanding of the rules." *Id.*

In its denial of Union Parish's Appeal, the Administrator relied in part on federal procurement rules contained in Part 48 of the Code of Federal Regulations. Citing 48 C.F.R. §§ 9.505(a) and (b), the Administrator supports its assertion that Union Parish and Send violated the competitive bidding rules:

Conflict of interest principles that apply in competitive bidding situations include preventing the existence of conflicting roles that could bias a contractor's judgment, and preventing unfair competitive advantage.

As previously stated, USAC is not empowered to make policy, interpret any unclear rule promulgated by the Commission ⁶⁷ or to create the equivalent of new guidelines. ⁶⁸ In its denial of Union Parish's Appeal, it appears the Administrator exceeds its authority by applying the federal procurement rules and creating the equivalent of new guidelines for the E-rate Program.

First, Snell did not have "conflicting roles" for Union Parish and Send. Snell was an employee only of Union Parish. He was not a representative, agent or employee of Send and he had no management responsibilities for Send. Furthermore, the State of Louisiana ruled that Snell had no conflict of interest. These state law interpretations on such matters *do* apply under the FCC's competitive bidding rules.

The facts of this case demonstrate that Union Parish complied, in good faith, with the FCC's competitive bidding rules, local and state procurement rules, and the SLD's Program rules regarding competitive bidding that were in effect for the funding year in question. Yet the Administrator, instead of applying the relevant rules for the relevant time periods to Union

⁶⁷ 47 C.F.R. § 54.702(c).

⁶⁸ *NECA Third Report and Order*, 13 FCC Rcd at 25066-67.

Parish's case, disregards the rights of Union Parish (and its service providers) and applies a wholly inapplicable statute. In its *Universal Service Order* regarding the universal service support mechanism and the E-rate Program, the Commission specifically stated that Part 48 of the Code of Federal Regulations is "inapplicable" to the schools and libraries program.⁶⁹ The Administrator exceeded its authority when it applied Part 48 rules to the Union Parish case.

E. Do the Facts in Union Parish's Case Warrant Waiver of the Commission's Competitive Bidding Rules?

The competitive bidding rules were followed in Union Parish's case and, in fact, the service contracts to Send were awarded after a full, fair and open competitive bidding process. If, however, the Commission determines that by listing Snell as a contact person on Union Parish's Form 470s violated the letter and the spirit of the competitive bidding rules because Send later decided to bid for Union Parish's services, then Union Parish requests that the Commission waive the competitive bidding rules in this case. As further discussed below, the harm resulting from rescinding the monies allocated to Union Parish and its vendors/service providers far outweigh any purported benefit in denying the waiver. It is in the public interest to grant a waiver of the Commission's competitive bidding requirements in this case.

Pursuant to Section 1.3 of its rules, the Commission may waive one of its rules or procedures when good cause is shown.⁷⁰ The U.S. Court of Appeals for the District of Columbia has found that a waiver is appropriate "if special circumstances warrant a deviation from the

⁶⁹ *Universal Service Order*, 12 FCC Rcd at 9029-30.

⁷⁰ 47 C.F.R. § 1.3.

general rule and such deviation will serve the public interest." ⁷¹ Furthermore, there must be a rational policy supporting the grant a waiver. ⁷² In reviewing a waiver request, the Commission also can weigh "considerations of hardship, equity, or more effective implementation of overall policy." ⁷³ Union Parish's waiver request meets this standard and should therefore be granted.

Grant of a waiver in this case will serve the public interest. As previously discussed, there is no way Union Parish could have known when it filed its Form 470 that listing Snell, an employee of Union Parish, would create a potential competitive bidding issue solely because Send would later choose to bid on Union Parish's services. Snell is a minority unitholder of Send and does not participate in the general business operations of the company. Snell is not a representative or employee of Send. There are no federal rules applicable to the E-rate Program that discuss conflicts of interest, nor were there Support Mechanism rules discussing the same in 1999. Furthermore, the Louisiana Ethics Board reviewed the facts of this case and found that there was no prohibited conflict of interest. Federal law in these matters, to the extent any existed, does not preempt state law. As previously discussed, Union Parish remained in control of the competitive bidding process and did not delegate to Send any authority with regard to the bidding process. Send also did not intervene in or attempt to influence the competitive bidding process to the detriment of other service providers. In fact, the bids Union Parish accepted from Send were the lowest for the services received.

⁷¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 n.3 (D.C. Cir. 1990) ("*Northeast Cellular*"); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 n.8 (D.C. Cir. 1969) ("*WAIT Radio*").

⁷² *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

⁷³ *WAIT Radio*, 418 F.2d at 1159 n..8.

The critical public interest policies served by the Commission's competitive bidding rules are to ensure that schools and libraries seeking support through the E-rate Program obtain the most cost-effective services available, thereby lessening applicants' demands on universal service funds and increasing funds available to other applicants.⁷⁴ Through Union Parish's competitive bidding process, there was fair and open competitive bidding for services, and at the end of the bidding process, Send was found to be most cost-effective choice. Thus, the process Union Parish went through to choose Send explicitly met the public policy objectives that underlay the competitive bidding rules.

Furthermore, the failure to grant a waiver will result in irreparable harm to all service providers and Union Parish. The SLD's commitment adjustment letters were issued years after the SLD reviewed and approved Union Parish's applications and paid monies for Funding Years 1999 through 2001. Internet access services and internal connections were already provided by Send and the other service providers and paid for by Union Parish. Accordingly, if a waiver is not granted, service providers will be forced to return monies for rendered services and backbill Union Parish, which as a small rural system does not have funding in its budget to pay for over \$575,000.00 services rendered years ago. Either Send or other service providers will be irreparably harmed, or the students and faculty of Union Parish will be irreparably harmed, which is in direct conflict with the purposes of the E-rate Program.

Although the Commission has considered and rejected waiver requests in prior appeals of SLD funding decisions, the facts of this case are clearly distinguishable from those prior decisions. For example, in the *MasterMind* line of cases, the SLD denied requests for funding

⁷⁴ *Universal Service Order*, 12 FCC Rcd at 9029.

that it had yet to allocate to applicants.⁷⁵ The end result in those cases was only that the applicants had to wait another year to apply for and receive funding for services supported by the E-rate Program. In contrast, in the case of Union Parish, the SLD has already reviewed, granted and allocated funds pursuant to Union Parish's Form 470s and service provider have in good faith already provided services under those grants. To now reverse the SLD's prior approvals and reclaim amounts already paid would be patently unfair and irreparably harm Union Parish and its service providers.

A waiver in this case also is warranted because the Commission has never explained that listing an employee of the applicant, who has a minority and silent ownership interest in a service provider, as a contact person on a Form 470 violates the E-rate Program's competitive bidding procedures. This is the first instance in which the Commission has had the opportunity to address these novel circumstances. Thus, Union Parish, and other participants in the E-rate Program have had no reason to believe that holding a minority, non-controlling unitholder interest in a service provider may be an impermissible "association" under the Commission's and SLD's rules. The Commission also must consider that, as previously discussed, it did not clarify that being "associated" with a service provider may run afoul of the E-rate Program's competitive bidding requirements until March 2001 in *Carethers*, decided well after Union Parish submitted and the SLD approved its Form 470s.⁷⁶ At the time Union Parish submitted its Form 470s there was very little information available regarding the competitive bidding process (and no information

⁷⁵ See e.g. *Mastermind*, 16 FCC Rcd at 4035; *Dickerson*, 17 FCC Rcd at 15750.

⁷⁶ *Carethers*, 16 FCC Rcd at 6947-48 (holding that the contact person listed on a Form 470 was likely "associated" with a service provider because the last name of the contact person was the same last name of an employee of the service provider).

regarding conflicts of interest or passive unitholder interests by employees of schools or libraries in service providers). Union Parish therefore followed and complied with the competitive bidding rules and the conflict of interest regulations set forth in the state and local procurement guidelines, and it received a favorable ruling from the state on the conflict of interest issue.

The Commission has previously granted waiver requests "in light of the uncertain application of our rules to the novel situation presented."⁷⁷ For example, in *Ysleta* the Commission directed the SLD to allow certain applicants to reapply for E-rate discounts, even though the Commission concluded that the applicants violated the E-rate Program's competitive bidding process by using a two-step System Integration approach.⁷⁸ According to the Commission, a waiver was appropriate in *Ysleta* because the applicants were likely confused by the application of a new rule to the novel facts presented in that case.⁷⁹ The Commission should similarly conclude that a waiver is appropriate here because the SLD is applying its rule regarding having an association with a service provider to the novel facts in Union Parish's and Send's case.

The Commission in *Ysleta* also took into consideration that the applicants relied on the SLD's tacit prior approval of two-step System Integration approach:

The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules.

⁷⁷ *Ysleta* ¶ 72.

⁷⁸ *Id.* ¶ 66.

⁷⁹ *Id.* ¶ 72.

Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants. Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.⁸⁰

Union Parish continued to submit Form 470s with Snell listed as the contact person for the school system because the SLD continued to approve Union Parish's funding requests. In good faith, Union Parish relied on the SLD's prior approvals of its Form 470s and would not have submitted additional funding requests had it thought or known that listing Snell as its contact person violated the intent of the E-rate Program's competitive bidding process. In reliance on the granted and funded applications, valuable services were rendered and paid for. As in *Ysleta*, the Commission should therefore consider Union Parish's reliance on the rules and interpretations regarding competitive bidding and conflicts of interest that were available in 1999, and the SLD's grant of Union Parish's applications in 1999, 2000 and 2001, and grant this waiver request.

F. Did The Administrator Exceed its Authority In its Post-Commitment Review?

Because of the uncertainty in the Administrator's authority regarding funding rescission, some service providers refused to participate in the program or began demanding clauses and contracts that applicants would be held liable if E-rate discounts were retroactively denied. On September 30, 2003, BellSouth petitioned the Commission for assurance that it would not be subject to COMAD should it act as "Good Samaritan" for the State of Tennessee.

The COMAD Waiver Order, FCC 99-292, recognized the fact that this is an exceedingly complex program where funding mistakes will happen. However, the Commission acknowledged that applicants in Year One had not been put on notice that the Administrator

⁸⁰ *Id.* ¶ 73 (citations omitted).

would seek to recoup funds improperly dispersed.⁸¹ The waivers in this instance were given to applicants who had violated competitive bidding rules, were funded for ineligible services, or were funded in violation of the Rules of Priority to name but a few. The Commission held that applicants and service providers should have been given notice that funding could be rescinded. Consequently the following language was added in the fine print to certification forms in Year Two:

Applicants' receipt of funding commitment is contingent on their compliance with all statutory, regulatory, and procedural requirements of the universal service mechanisms for schools and libraries. FCC Form 471 Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Commission may undertake periodically to assure that funds have been committed and are being used in accordance with all such requirements. If the SLD subsequently determines that its commitment was erroneously issued either due to action or inaction, including but not limited to that by SLD, the Applicant, or service provider, and that the action or inaction was not in accordance with such requirements, SLD may be required to cancel these funding commitments and seek repayment of any funds disbursed not in accordance with such requirements. The SLD, and other appropriate authorities (including but not limited to USAC and the FCC) may pursue enforcement actions and other means of recourse to collect erroneously disbursed funds. The timing of payment of invoices may also be affected by the availability of funds based on the amount of funds collected from contributing telecommunications companies.⁸²

While the new language was relatively broad in scope, it provides specific guidance for post-commitment procedures. "Applicants who have received funding commitments continue to be subject to audits and other reviews that SLD or the Commission may undertake periodically

⁸¹ FCC 99-292 at 7.

⁸² FCC 99-292 Footnote 19.

to assure that funds have been committed and are being used in accordance with all such requirements."

Clearly, the intention here is to treat post-commitment reviews differently from pre-commitment reviews. In the post-commitment scenario, the Administrator must audit the applicant or initiate some "other review" to determine if funds have been committed in error.

The intent of additional COMAD restrictions on the Administrator should be self-evident. Applicants would not begin a project while a discount application was under review, as the applicant may have insufficient funds to complete the project or engage the services without financial assistance through the E-rate discount mechanism. Once a funding commitment has been issued, applicants can begin to obtain services with assurance that the discounted portion will be paid, provided the services are eligible, telecommunications services were provided by a common carrier, and the applicant did not engage in fraudulent or illegal practices to obtain funding. The test for post-commitment COMAD should necessarily be very restrictive on the Administrator, lest the applicant community be subject to COMAD for any number of reasons years after services were provided and service providers paid.

Seeing the potential for disaster with widespread demands for return of funds, the Commission was very specific and limiting with instructions to the Administrator with its authority to adjust funding commitments. According to the COMAD Order,⁸³ the Administrator is limited to adjusting funding commitments to: (1) applications seeking discounts for ineligible

⁸³ FCC COMAD Order, FCC 99-291, Released October 8, 1999

services;⁸⁴ and (2) applications seeking discounts for telecommunications services to be provided by non-telecommunications carriers.⁸⁵ It was not necessary for the Commission to include COMAD of commitments obtained through fraud, as those commitments should be revoked as a matter of criminal law.

Funding requests in question under this Request for Review do not meet these limited tests. The services which were requested were clearly eligible and telecommunications services were provided by telecommunications common carriers. The applications were reviewed by the Administrator and properly funded. The Administrator was not authorized to COMAD these funding requests under the Commission's COMAD Order. "Review" in such cases could be in the form of a post-commitment audit to determine whether discounted services were actually used effectively. Without dispute, they were in Union Parish.

IV. RELIEF SOUGHT.

Pursuant to Section 254 of the Act⁸⁶ and Section 54.719 of the Commission's rules,⁸⁷ Union Parish requests that the Commission reverse the Administrator's decision denying Union Parish's Appeal and direct the SLD to withdraw the CALs it issued to service providers and Union Parish. If, however, the Commission does not overturn the Administrator's decision, Union Parish requests a waiver of the E-rate Program's competitive bidding rules.

⁸⁴ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9002 (1997), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Erratum, FCC 97-157 (rel. June 4, 1997), *aff'd in part, rev'd in part, remanded in part sum nom Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (*Universal Service Order*).

⁸⁵ 47 U.S.C. § 254(h)(1)(B)

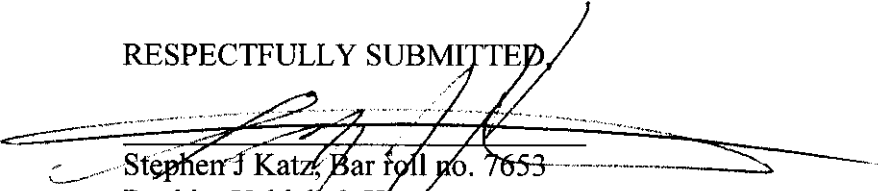
⁸⁶ 47 U.S.C. § 254.

⁸⁷ 47 C.F.R. § 54.719 (providing that any party aggrieved by an SLD or USAC decision may seek redress from the Commission).

V. CONCLUSION.

The Commission should overturn the Administrator's decision, and direct the SLD to withdraw the CALs because: (1) There was no prohibited conflict of interest under applicable law that compromised Union Parish's competitive bidding process; (2) Union Parish complied with the letter and spirit of all applicable competitive bidding rules and the intent underlying such rules; (3) Later-adopted Commission precedent regarding the competitive bidding rules, including the *MasterMind* cases, is inapplicable to Union Parish's granted applications and involves easily distinguishable facts; (4) The SLD and the Administrator exceeded their authority when they interpreted current Commission precedent regarding the competitive bidding rules and retroactively applied such interpretations to Union Parish's E-rate applications granted in 1999 and 2000; (5) The Administrator exceeded its authority when it justified its actions in the Union Parish case by relying on Part 48 regulations that are wholly inapplicable to the E-rate Program; and (6) The Administrator exceeded its authority in the post-commitment review of Union Parish.

RESPECTFULLY SUBMITTED,



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February 24, 2004

**DECLARATION
OF
UNION PARISH SUPERINTENDENT**

Union Parish Superintendent, being duly sworn, declares as follows:

1. My name is Tom Snell. I am the Superintendent of the Union Parish School Board ("Union Parish). My office address is 1206 Marion Hwy. Farmerville, LA 71241. I submit this declaration in support of the Consolidated Request for Review, dated February 24, 2004 ("Request for Review").
2. All of the facts set forth in the Request for Review in the section titled "Statement of Facts" including the information pertaining to the competitive bidding process undertaken by Union Parish School Board under the E-rate Program, are true and correct to the best of my knowledge.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of February, 2004.



Tom Snell

**DECLARATION
OF
UNION PARISH BUSINESS MANAGER**

Union Parish Business Manager, being duly sworn, declares as follows:

1. My name is Donna Cranford. I am the Business Manager of the Union Parish School Board ("Union Parish). My office address is 1206 Marion Hwy. Farmerville, LA 71241. I submit this declaration in support of the Consolidated Request for Review, dated February 24, 2004 ("Request for Review").
2. All of the facts set forth in the Request for Review in the section titled "Statement of Facts" including the information pertaining to the competitive bidding process undertaken by Union Parish School Board under the E-rate Program, are true and correct to the best of my knowledge.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of February, 2004.



Donna Cranford

CERTIFICATE OF SERVICE

I, Stephen J Katz, do hereby certify that I have on this 24th day of February, 2004, had copies of the foregoing CONSOLIDATED REQUEST FOR REVIEW delivered to the following via First Class Mail:

Eric Einhorn
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Universal Service Administrative Company
Letter of Appeal
Box 125 - Correspondence Unit
80 S. Jefferson Rd
Whippany, NJ 07981

Send Technologies, LLC
Attn: Mark Stevenson
2904 Evangeline Street
Monroe, LA 71201

William Maher
Office of the Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Lisa Spooner Foschee
BellSouth Corporation, Legal Department
675 West Peachtree Street, N.W.
Suite 4300
Atlanta, Georgia 30375-0001

by placing same in the United States mail, postage prepaid.


Stephen J Katz